

No. 77-292

Supreme Court, U. S.

FILED

OCT 6 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES POSTAL SERVICE, PETITIONER

v.

ASSOCIATED THIRD CLASS MAIL USERS

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**REPLY MEMORANDUM FOR THE UNITED STATES
POSTAL SERVICE**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

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**REPLY MEMORANDUM FOR THE UNITED STATES
POSTAL SERVICE**

1. Respondent incorrectly contends (Br. in Opp. 8-10) that this case is not moot. Respondent argues that its original complaint in the district court requested both declaratory and injunctive relief and "[s]uch other and further relief as this Court may deem just and proper"; that as appellee in the court of appeals it preserved its plea for such "other" relief by requesting that court not only to affirm the award of injunctive relief but also to provide " 'restitution for the temporary rate increases illegally collected since December 31, 1975' " (Br. in Opp. 9); and that although restitution was not awarded by the court of appeals, and respondent has not sought review of the decision below, its rejected claim for restitution prevents the case from becoming moot. This chain of reasoning contains several legal errors.

On November 4, 1975, respondent moved for a preliminary injunction (App. A, *infra*), but the parties stipulated on November 21, 1975, that that motion would be treated as a motion for summary judgment (App. B, *infra*). On December 16, 1975, the district court granted the motion and enjoined the Postal Service from placing the temporary rates into effect until it complied with procedures set forth in the court's opinion (Pet. App. 99A).¹ The order therefore finally disposed of respondent's complaint and prayer for relief. Respondent did not appeal from the order, but instead appeared in the court of appeals only as an appellee. It is well settled, however, that an appellee may not, without taking its own appeal, urge an appellate court to enlarge the scope of the lower court's judgment in its favor. *United States v. American Ry. Express Co.*, 265 U.S. 425, 435; *United Optical Worker's Union Local 408 v. Sterling Optical Co., Inc.*, 500 F. 2d 220, 224 (C.A. 2). Accordingly, the court of appeals was without jurisdiction to consider respondent's request for relief beyond that granted by the district court, and the court's silence concerning that request reflects its lack of jurisdiction.

In short, by the time it was submitted to the court of appeals, this case concerned only respondent's request for declaratory and injunctive relief. For the reasons stated in our petition for a writ of certiorari (pp. 10-14), therefore, the case was moot by the time the court of appeals issued its decision.

¹While the court did not describe its order as a permanent injunction, the order unambiguously had the effect of a permanent injunction. Unlike a preliminary injunction, which would have been effective only during the pendency of a decision on the merits, the court's order restrained the Postal Service until it satisfied the conditions established in the court's opinion, which itself was the decision on the merits.

Moreover, even if respondent preserved its claim for other relief in the court of appeals, it has not done so in this Court. Respondent has not filed a petition for a writ of certiorari to review the court of appeals' failure to provide the "other" relief it requested, and the time for seeking review has long since passed. Only declaratory and injunctive relief are now at issue, and respondent's only interest in such relief lies not in the relief itself but in the possible collateral consequences of the legal holding upon which that relief was based (see Pet. 10-14). An interest of that kind does not save a case from mootness; to the contrary, the existence of such an interest underscores the propriety of vacating the judgment below as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36; cf. *Roe v. Wade*, 410 U.S. 133, 125.²

2. Respondent, relying upon *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, and *Vitarelli v. Seaton*, 359 U.S. 535, argues (Br. in Opp. 10-12) that the later decision in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, is inapplicable here and that the Board of Governors was required to follow its internal operating procedures because the proceedings those procedures govern "have substantial public impact" (Br. in Opp. 11). But those operating procedures, like the

²Respondent argues (Br. in Opp. 13-14) that any collateral consequences of the decision below are only "potential possibilit[ies]." But it is precisely the existence of such possibilities that warrants vacating the judgment below to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, *supra*, 340 U.S. at 41. See also *United States v. Hamburg—American Co.*, 239 U.S. 466, 475. Moreover, respondent's assertion (Br. in Opp. 14) that "a large amount of money is involved," coupled with its emphasis on its claim for restitution (*id.* at 7-8), suggests that the possibility that the decision below will spawn collateral consequences is hardly remote.

regulations involved in *American Farm Lines*, were designed "to assure the Board the data necessary for decision" (Pet. 16, n. 12; Pet. App. 58A-59A), not "to confer important procedural benefits upon individuals * * * as in *Vitarelli* * * *." *American Farm Lines v. Black Ball Freight Service*, *supra*, 397 U.S. at 538-539. Accordingly, "there is no reason to exempt this case from the general principle that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it * * *.'" *Id.* at 539.³

For the reasons stated here and in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General.

OCTOBER 1977.

³Respondent also asserts that the Board's operating procedures were adopted by resolution and therefore, under 39 C.F.R. 3.9, "negated any delegation of authority relating to requests to the Commission for recommended decisions on rate increases" (Br. in Opp. 3). This contention is factually incorrect. The operating procedures were adopted in December 1971 by motion, not by resolution (App. C, *infra*, p. 6a). Accordingly, those procedures did not detract from the Postmaster General's broad delegated "authority to exercise the powers of the Postal Service to the extent that such delegation of authority does not conflict with powers reserved to the Governors or the Board by law, these bylaws, or resolutions adopted by the Board." 39 C.F.R. 3.9.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATED THIRD CLASS MAIL USERS
1725 K Street, N.W., Washington, D.C. 20006

PLAINTIFF,

v.

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza West, S.W., Washington, D.C. 20260
POSTAL RATE COMMISSION, CLYDE S. DU PONT, CHAIRMAN,
PAUL A. MILTICH, KIERAN O'DOHERTY, FRANK P. SAPONARO,
CARLOS C. VILLARREAL, in their capacities as members of the
POSTAL RATE COMMISSION
2000 L Street, N.W., Washington, D.C. 20268

DEFENDANTS

CIVIL ACTION No. 75-1809

MOTION OF PLAINTIFF ASSOCIATED THIRD CLASS MAIL USERS FOR PRELIMINARY INJUNCTION

Plaintiff, Associated Third Class Mail Users (ATCMU), respectfully moves this Court for a preliminary injunction prohibiting the United States Postal Service from increasing the current fees charged for special and other postal services. A proposed order granting this motion is attached hereto. In support of this motion there is also attached hereto a Memorandum of Points and Authorities. The complaint of ATCMU filed in this case is also submitted in support of this motion.

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ATCMU respectfully requests an oral hearing on this motion.

Respectfully submitted,

J. EDWARD DAY

WILLIAM F. TAYLOR

COX, LANGFORD & BROWN
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 785-0200

ATTORNEYS FOR PLAINTIFF
ASSOCIATED THIRD CLASS
MAIL USERS

NOVEMBER 4, 1975

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APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATED THIRD CLASS MAIL USERS,
PLAINTIFF,
and

NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED
CHILDREN AND ADULTS
APPLICANTS FOR INTERVENTION,
v.

UNITED STATES POSTAL SERVICE, ET AL.,
DEFENDANTS.

CIVIL ACTION No. 75-1809

STIPULATION

The parties through counsel hereby stipulate and agree to the following procedural schedule in this action:

1. Plaintiff's motions for preliminary injunctions shall be treated for purposes of this litigation as motions for summary judgment.
2. Defendants shall file cross-motions for summary judgment on or before November 26, 1975.
3. Plaintiff's shall have until December 5, 1975, to file their reply to defendants' cross-motion for summary judgment.

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4. The parties agree that the case will be ready for oral argument on the motions at the Court's convenience any time after December 8, 1975.

J. EDWARD DAY
ATTORNEY FOR PLAINTIFF

KENNETH WELLS PARKINSON
ATTORNEY FOR APPLICANTS FOR
INTERVENTION

PAUL M. TSCHIRHART
ASSISTANT UNITED STATES
ATTORNEY
ATTORNEY FOR DEFENDANTS

APPROVED this 21st day of November, 1975.

UNITED STATES DISTRICT
JUDGE

Filed November 21, 1975
JAMES F. DAVEY, CLERK

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APPENDIX C

UNITED STATES POSTAL SERVICE
THE BOARD OF GOVERNORS
Washington, D.C. 20260

MINUTES

A regular meeting of the Board of Governors of the United States Postal Service was held at Postal Service Headquarters, 12th Street and Pennsylvania Avenue, N.W., Washington, D.C. on December 7, 1971. The following members were present:

Theodore W. Braun
Charles Coddington
Patrick E. Haggerty
Merrill A. Hayden
Andrew D. Holt
George E. Johnson
Frederick R. Kappel
E. T. Klassen
Crocker Nevin
M. A. Wright.

Mr. Hargrove presented a revised version of the Postal Service budget program for fiscal year 1973, and there was a detailed review of the changes made since the tentative budget was originally considered by the Board at its September meeting. After discussion, and upon motion duly made, seconded and carried, the Board approved the revised budget program, and directed that it be transmitted to the Office of Management and Budget pursuant to 39 U.S.C. §2009.

It was determined that the budget for fiscal year 1974 should be considered in the context of a longer range plan to be proposed by the operating management.

The Board then discussed a revised draft of the proposed operating procedures, reflecting the suggestions offered at the September meeting, and after certain further changes had been made, and upon motion duly made, seconded and carried, the statement of operating procedures annexed hereto and incorporated herein was approved.

Mr. Holland and Mr. Ellington made a presentation to the Board on the advertising program of the Postal Service, and outlined the estimated increases in revenue that such a program might generate. Subject to further review by management, the Board approved an increase of \$3,870,000 in the advertising budget for Fiscal Year 1972. For planning purposes, tentative approval was given to the Fiscal Year 1973 advertising budget totaling \$17,000,000.

The Board then discussed the draft of a proposed statement on the purpose and goals of the Postal Service, and requested management to present a revised draft for consideration at a future meeting.

Mr. Hayden excused himself from the meeting, and the Governors proceeded to discuss the election of a Chairman and Vice Chairman of the Board. Following such discussion, and upon motion duly made, seconded and unanimously carried, the Governors elected Mr. Frederick R. Kappel to the office of Chairman of the Board, effective immediately, to serve for a term of one year, pursuant to section 5.1 of the Bylaws. Upon motion duly made, seconded, and unanimously carried, Mr. M. A. Wright was then elected Vice Chairman of the Board, to hold office at the pleasure of the Board pursuant to section 5.2 of the Bylaws.

The Chairman then proposed the appointment of Mr. E.T. Klassen as Postmaster General, presenting a suggested contract of employment in this connection, and Mr. Klassen excused himself from the meeting. A discussion ensued, after which, upon motion duly made, seconded, and unanimously carried, the remaining eight Governors then adopted Resolution 71-24, "Appointment and Compensation of Postmaster General," annexed hereto and incorporated herein.

Mr. Klassen then rejoined the meeting and indicated his acceptance of the appointment.

The Board accepted Mr. Nelson's resignation as Secretary, effective December 15, 1971. Mr. Hayden having rejoined the meeting, there was a general discussion of the roles of the Postmaster General and Deputy Postmaster General, following which the meeting was adjourned.

David A. Wilson
Secretary